UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CITY OF HURRICANE, WEST VIRGINIA; and THE COUNTY COMMISSION OF PUTNAM COUNTY, WEST VIRGINIA,	)	
Plaintiffs,	)	Case No. 3:14-cv-15850
v.	)	
DISPOSAL SERVICE, INC., and WASTE MANAGEMENT OF WEST VIRGINIA, INC.,	)	
Defendants	)	

GOVERNMENTAL PLAINTIFFS' SUPPLEMENTAL RESPONSE MEMORANDUM, FILED PURSUANT TO THIS COURT'S ORDER DATED JUNE 30, 2014

Plaintiffs, the City of Hurricane, West Virginia, and the County Commission of Putnam County, West Virginia, pursuant to this Court's order of June 30, 2014, respond as follows to Defendants' Supplemental Reply Memorandum, filed Thursday, July 3, 2014:

1. As a threshold matter, for the Defendants' Rule 12(b)(1) motion, Defendants cannot and do not deny that they have asked the Court to consider and resolve jurisdictional issues that are "inextricably intertwined" with factual matters which are central to the merits of plaintiffs' claims.[1] The Fourth Circuit instructs that such facts should be resolved *only* after the non-moving party has been afforded all of the procedural safeguards of the Fed.R.Civ.Proc. 56 summary judgment process, including an opportunity to conduct appropriate discovery. *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 334 (4th Cir. 2014). In such case, a presumption of truthfulness should attach to plaintiff's allegations, *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982), and the district court should presume that it has jurisdiction, resolving the disputed issues only after appropriate discovery and factual development has been completed. *In re KBR*, 744 F.3d at 334 (citing *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009)); *Lufti v. United States*, 527 Fed.Appx. 236, 241 (4th Cir. 2013) (citing *Kerns* for the proposition that a trial court should dismiss under Rule 12(b)(1) only when the jurisdictional allegations are clearly immaterial to plaintiff's claims).

[1] As discussed in the Governmental Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, Defendants' motion to dismiss asks this Court to adjudicate the nature of the "Crude MCHM" Wastes and Residues—to determine that those wastes are not "hazardous wastes" within the meaning of RCRA Subtitle C—and then to dismiss the Governmental Plaintiffs' complaint for lack of subject matter jurisdiction, for failing to comply with the 90-day "notice and delay" requirement of RCRA § 7002(b)(2)(a), 42 U.S.C. § 6972(b)(2)(a). Defendants thus ask this Court to resolve, in the context of a Rule 12(b)(1) motion, disputed issues concerning the nature of the wastes that Defendants accepted for disposal—issues which are central to the Governmental Plaintiffs' claims that the disposal of such wastes at the DSI Landfill creates an imminent and substantial endangerment and public nuisance to public health, welfare and the environment. Stated differently, the very nature of these wastes is a matter of substantial and material dispute between the parties.

2. As to their Rule 12(b)(6) motion, Defendants offer no legal authority to support their request that this Court consider whatever extrinsic documents Defendants can find that they hope will marginally support their position. When ruling on a Rule 12(b)(6) motion to dismiss, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197 (2007). In resolving a Rule 12(b)(6) motion, a district court cannot consider matters outside the pleadings without converting the motion into a motion for summary judgment. *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (citing Fed.R.Civ.P. Rule 12(d)).[2]

3. Where, on a Rule 12(b)(6) motion, matters outside the pleadings are presented to the court and not excluded, the motion must be treated as one for summary judgment under Rule 56. Fed.R.Civ.P. Rule 12(d). In such case, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* The Fourth Circuit has instructed that "reasonable opportunity" requires that the parties be given some indication by the court that the Rule 12(b)(6) motion will be considered a motion for summary judgment and that the party opposing the motion then be provided an opportunity to file counter affidavits or pursue reasonable discovery. *Logar v. West Virginia University Board of Governors*, 493 Fed.Appx. 460, 461 (4th Cir. 2012) (citing *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985)). As a general matter, conversion of a Rule 12(b)(6) motion to a Rule 56 motion "is not appropriate where the parties have not had an opportunity for reasonable discovery." *E.I. DuPont*, 637 F.3d at 448-49. Here, Defendants persist in their efforts to convert their motion to dismiss to a Rule 56 summary judgment proceeding by offering additional extrinsic documents. That persistence must

[2] Accordingly, although this Court's Order dated June 30, 2014, directs the parties to address what weight should be given to Mr. Armstead's letter and the importance of that letter, Governmental Plaintiffs respectfully assert that the threshold question of whether that letter may even be considered should be answered in the negative.

necessarily be interpreted as Defendants' withdrawal of their motion to dismiss, their concession of this Court's jurisdiction, and their invitation for this Court to extend to the Governmental Plaintiffs all of the protections of the Rule 56 process, including full discovery and the opportunity to present opposing evidence under *E.I. DuPont.*

4. Even if one were to disregard the Fourth Circuit's instructions as to both Rule 12(b)(1) motions and Rule 12(b)(6) motions and consider the instant letter from U.S. EPA employee John Armstead offered for the Court's consideration by the Defendants, that letter is highly problematic for the purposes of determining whether the waste materials accepted by Defendants are or should be considered, in these emergency circumstances, hazardous wastes under Subtitle C of RCRA. ***First***, other than the title on his letter, we know nothing about who Mr. Armstead is—aside from the fact that he has access to U.S. EPA letterhead—or whether he has any authority to speak on behalf of U.S. EPA or the West Virginia Department of Environmental Protection, which administers the state hazardous waste program that operates "in lieu of" the federal program in West Virginia.[3] Mr. Armstead's letter does not advance or support his authority to speak on behalf of a federal or state agency.

5. Indeed, from a procedural and administrative perspective, Mr. Armstead's letter is very unusual, to say the least. It purports to be some form of administrative determination, by or on behalf of the United States Environmental Protection Agency—a pronouncement that "Crude

[3] As noted in paragraph 42 of the Complaint, West Virginia has its own hazardous waste program, which has been formally approved by the Administrator of the U.S. Environmental Protection Agency, *see* 51 FR 17739B (May 15, 1986); 65 FR 29973 (May 10, 2000); 78 FR 70225 (November 25, 2013), and, accordingly, operates "in lieu of" the federal RCRA program within the State of West Virginia, 42 U.S.C. § 6926(b). It is not up to U.S. EPA to determine what is and what is not a regulatory hazardous waste under West Virginia's program. Mr. Armstead's letter is unclear on whether he claims some authority to interpret, change, or limit West Virginia's hazardous waste program and run it by himself or whether he is simply offering an opinion on a program which U.S. EPA does not administer.

MCHM" is not a Subtitle C hazardous waste. However, Mr. Armstad's letter is clearly **not** a RCRA "Interpretive Ruling" by U.S. EPA requiring review and approval by the Administrator of U.S. EPA and the U.S. EPA Office of General Counsel.[4] But if the letter is to serve as some form of interpretive guidance less than an "Interpretive Ruling," there is no indication that it has been issued by anyone with any degree of authority. If, on the other hand, the letter is to serve as some form of pronouncement of decision or rulemaking, it fails, completely, to comply with the Administrative Procedure Act (APA) of 1946 (5 U.S.C. §551 *et seq.*). Mr. Armstead's unusual letter determination was never published in the Federal Register for notice or comment, and there is no administrative record which can inform anyone what exactly he was asked to say, what information he was provided, and what comments were made. Thus, notwithstanding Mr. Armstead's statements as to what U.S. EPA "believes," his letter *cannot* and *should not* be regarded as authoritative final statement by a federal agency, entitled to deference by this Article III Court, that has the unquestionable ultimate constitutional authority to interpret and apply the federal statutes, including RCRA, at issue herein.

6. ***Second,*** Mr. Armstead's letter indicates that he was asked two questions "regarding the chemical 4-methylcyclohexanemethanol," which he then refers to as "Crude MCHM." But "Crude MCHM" is a trade name for a commercial chemical product that is ***just one*** of the toxic chemicals that was released from the Freedom Industries, Inc., site in

[4] Respectfully, Mr. Armstead is not the U.S. EPA Administrator, or even an Assistant or Deputy Administrator. Nor is he the Regional Administrator or even an Assistant Regional Administrator; he is a division head in one of eleven regional offices. Moreover, Defendants' reliance upon *Ohio Valley Env'l Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), to argue for this Court's deference to Mr. Armstead's letter is entirely misplaced. In *Ohio Valley*, the position of the relevant agency (the U.S. Army Corps of Engineers) was advanced to the Court by the U.S. Department of Justice ("DOJ") *on behalf of the director of the agency*, which was a party litigant before the court. There was no question that the position articulated by DOJ was indeed the final position of the Corps of Engineers. Such is ***not*** the case here, since U.S. EPA is not before the Court—just a letter from a mid-level manager in a regional office—and the ostensible agency position is being advanced by Defendants for their own purposes.

Charleston, West Virginia this past January. At least two others—propylene glycol phenyl ether ("PPH") and dipropylene glycol phenyl ether ("DiPPH")—were also released from the site and were likely also disposed of at the DSI Landfill. (Complaint, ¶ 13) Mr. Armstead offers no opinion as to whether he would consider either of those other chemicals to be RCRA Subtitle C hazardous wastes. Moreover, Mr. Armstead is apparently confused about what, exactly, is contained in "Crude MCHM." He opens his letter by acknowledging two questions "regarding the chemical 4-methylcyclohexanemethanol," which, in those two questions, is referred to as "Crude MCHM." Mr. Armstead apparently understands that the chemical 4-methylcyclohexanemethanol and "Crude MCHM" are one and the same. They are not. As alleged in the Complaint, "Crude MCHM" is *a chemical mixture* containing the chemical 4-methylcyclohexanemethanol and the commercial chemical product "methanol." "Methanol," which is both a listed "hazardous substance" under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (hereinafter: "CERCLA" or "federal Superfund Act"), 42 U.S.C. §§ 9601-9675, and where, when spilled (as it was at the Freedom Industries location), is a listed "hazardous waste" under Subtitle C of RCRA, *see*: 40 C.F.R. § 261.33. (Complaint, ¶¶ 14-16)

7. ***Third*** (and most importantly), Mr. Armstead's letter tells us nothing new—no one in this case, and most certainly not the Governmental Plaintiffs, has asserted that the chemical 4-methylcyclohexanemethanol or the chemical mixture of which it is a component (*i.e.,* "Crude MCHM) are listed hazardous wastes under either RCRA or the WV Hazardous Waste Management Act. (Though it is beyond dispute that "Crude MCHM" does contain methanol,

which ***is*** a listed hazardous waste under both statutes. It is also beyond dispute that "Crude MCHM" easily meets the statutory definition of "hazardous waste" under both RCRA § 1004(5), 42 U.S.C. § 9604(5), and under the West Virginia Hazardous Waste Management Act, West Virginia Code § 22-18-3(6).) Furthermore, no one in this case, and most certainly not the Governmental Plaintiffs, has asserted that "Crude MCHM" meets the existing regulatory definition of a characteristic hazardous waste under either the Subtitle C of the federal RCRA statute and its implementing regulations or the state Hazardous Waste Management Act statute and regulations. Mr. Armstead's letter wholly ignores the federal common law question presented squarely by the Governmental Plaintiff's instant complaint: when an emergency health-based toxicity limit, enforceable by law with respect to a public water supply is declared and imposed by competent authorities (in this case, the Governor of the State of West Virginia) to protect public drinking water from toxic risks, what is the corresponding effect under RCRA for that same substance with respect to protection of the groundwater and the subterranean environment? RCRA's statutory language is silent on how RCRA applies to this precise set of circumstance that now confront the public, the Governmental Plaintiff and this Court, though the legislative history of RCRA reflects a very strong Congressional intent to protect groundwater, through RCRA, from toxic substances for which enforceable health-based standards have been established for public water supplies. Prior to the date of the Freedom Industries, Inc., spill, this is precisely what the existing toxicity characteristic standard in RCRA Subtitle C accomplished. Now, the question of how the toxic characteristic standard set forth in RCRA should apply to the "Crude MCHM" and the circumstances which resulted from the spill emergency have given rise to a real and pressing need for this Court to articulate the federal common that will accomplish the congressional goals embodied in RCRA and fill, at least until appropriate congressional or

regulatory action can be finalized, the void left by the Congressional silence on this issue. Mr. Armstead has nothing at all to say on this issue.[5]

8. What is once more apparent in this action brought by the Governmental Plaintiffs to protect the public health, safety, welfare and the environment from unwarranted endangerments by hazardous substances is, of course, Defendants' attempt to obtain delay of the Governmental Plaintiffs' efforts to secure judicial relief, in the form of an abatement order, under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), and related state public nuisance abatement authorities with respect to the endangerments to public health and to the environment to which Defendants have contributed. As Defendants have observed, the Governmental Plaintiffs assert (correctly) that they are by express Congressional fiat entitled to be excused from compliance with the 90-day "delay" requirement under imposed by RCRA's "Citizen Suit" provision, 42 U.S.C. § 6972(b)(2)(A), because **one** of the Governmental Plaintiffs' claims in this case is a cause of action "respecting a violation of subchapter III of [RCRA]."[6] In fact, the Governmental Plaintiffs have pled and will prove in this action that they are entitled to relief under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), for endangerments resulting from both Subtitle C (*i.e.*, subchapter III) hazardous wastes, as well as from wastes which, though not Subtitle C hazardous wastes, are either or both "solid wastes" or statutory "hazardous wastes"

[5] Defendants' conclusion—that the Crude MCHM Wastes and Residues accepted for disposal at the DSI Landfill are not listed hazardous wastes under RCRA Subtitle C and have not been determined to be characteristic hazardous wastes—is, essentially, the Governmental Plaintiffs' statement of the problem, for until this disposal event occurred, every toxin regulated under the federal Safe Drinking Water Act ("SDWA"), 42 US.C. §§ 300f – 300j, to protect public drinking water supplies was also regulated as a toxin under RCRA, so as to protect groundwater from those same toxic threats by regulating land disposal of those toxics. Because the statutory and regulatory scheme of RCRA fail to address the congressional intent to so protect groundwaters when emergency circumstances require the creation of a new health-based, enforceable toxic contaminant level for drinking water, there is a federal common law question on what should occur where, as here, a responsible governmental entity sets an emergency drinking water standard for a toxin.

[6] Such violations are alleged in paragraphs 68 and 71 of the Complaint.

within the meaning of 42 U.S.C. § 6972(a)(1)(B).[7] Accordingly, the Governmental Plaintiffs' instant complaint is a "hybrid" complaint, incorporating both allegations of endangerment respecting an asserted violation of Subtitle C, and allegations of endangerment from solid wastes and statutory hazardous wastes unrelated to Subtitle C. In such cases, federal courts have uniformly reasoned that the determination of whether a RCRA "Citizen Suit" plaintiff is ultimately successful in proving a Subtitle C violation has no bearing upon whether other RCRA "Citizen Suit" claims in the Plaintiff's complaint not respecting any Subtitle C violations should be kept in federal court.[8] *AM International, Inc., v. Datacard Corp.*, 106 F.3d 1342, 1351 (7th Cir. 1997) (although plaintiff's Subtitle C hazardous waste claim was unsuccessful, it was not frivolous; accordingly, plaintiff's surviving section 7002(a)(1)(B) endangerment claim, not premised on Subtitle C hazardous wastes, was not subject to dismissal for failure to comply with the 90-day waiting period). Indeed, for the purposes of determining whether a complaint should be dismissed for failure to comply with the post-notice "delay" requirement, the question of whether a plaintiff has asserted a *meritorious* Subtitle C hazardous waste claim is irrelevant, since the question of whether proper notice was provided must be determined at the time of filing. *Id.* at 1351 (citing *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)). Where a plaintiff

[7] Where the statutory language of RCRA simply refers to "hazardous wastes" rather than to "hazardous waste identified or listed under this subchapter" (*i.e.,* RCRA Subtitle C), the statute refers directly to the broader set of wastes meeting the governing statutory definition of hazardous wastes, rather than those which meet the criteria of being listed or characteristic hazardous wastes. *See* Adam Babich, "RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers," 24 ELR 10122 (1994).

[8] As in their prior moving papers, Defendants incorrectly suggest that the "delay" requirement of 42 U.S.C. § 6972(b)(2)(A) is jurisdictional. The U.S. Supreme Court has declined to hold that such requirements are jurisdictional, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), as has the Fourth Circuit, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 400 (4th Cir. 2011). Indeed, more recent cases express greater certainty that such requirements are ***not jurisdictional***. *See, e.g., Adkins v. Vim Recycling, Inc.*, 644 F.3d 483 (7th Cir. 2011) (although the Supreme Court declined in *Hallstrom* to decide whether RCRA's notice and 60–day delay requirements for citizen suits are jurisdictional, "[u]nder the analysis the Supreme Court has applied more recently to similar questions, the clear answer is that they are not.")

asserts a hybrid complaint—containing allegations of endangerment respecting a Subtitle C violation(s) and allegations of endangerment not with respect to Subtitle C violation(s)—the delay period does not apply. *See id.*; *see also Dague v. City of Burlington*, 935 F.Supp.2d 1343 (2nd Cir. 1991) (although plaintiff's allegations of Subtitle C violations, contained within first and third counts, were not meritorious, the presence of such allegations rendered the complaint a hybrid complaint, "sufficient to trigger RCRA's exception to the delay period"),[9] *reversed, in part, on other grounds*, *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Simsbury-Avon Preservation Society v. Metacon Gun Club, Inc.*, 2005 W.L. 1413183 at *6 (D. Conn. 2005) (although plaintiff's subtitle C RCRA claim was subject to dismissal, since lead ammunition and clay fragments are not RCRA subtitle C hazardous wastes, plaintiff's remaining RCRA § 7002 claim, filed prior to the expiration of the applicable notice period, was not subject to dismissal, since the subtitle C claims were not frivolous.)[10]

9. Similarly, in *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81 (E.D.N.Y. 2001), the court considered the effect of plaintiffs' withdrawal of a Subtitle C claim upon the Plaintiff's remaining RCRA § 7002(a)(1)(B) claim that was unrelated to Subtitle C wastes, which claim Plaintiff had filed after fewer than 90 days notice. Noting that the withdrawn Subtitle C claim had *not* been frivolous, the *Aiello* took note of the Congressional intent underlying the "delay" requirement of RCRA's "Citizen Suit" provisions:

> Congress's intent in balancing the dangers of delay to health and the environment against encouraging nonjudicial and nonadversarial resolution of environmental conflicts is best

[9] A count based upon violations of RCRA Subtitle C "does not cease to be sufficient to keep the 'hybrid' compliant in court simply because [that count respecting RCRA Subtitle C] ultimately proved to be unsuccessful." *Dague*, 935 F.2d at 1353 (citing *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)).

[10] "Where a party brings a 'hybrid' complaint alleging both [Subtitle C] and [non Subtitle C] claims, the notice and delay requirements are inapplicable." *Simsbury-Avon Preservation Society*, 2005 W.L. 1413183 at *6 (D. Conn. 2005) (citing *Dague*, 935 F.2d at 1351).

> manifested by permitting the immediate initiation of (a)(1)(B) imminent hazard suits whenever subchapter III hazardous chemicals can fairly be alleged to be a component of the endangerment.

136 F.Supp.2d at 110. *Aiello* differs from the present case in that here, the Governmental Plaintiffs have not simply "fairly" alleged "subchapter III hazardous chemicals" as a component of the endangerment; they have meritoriously made that allegation. The Governmental Plaintiffs' claims herein should be permitted immediately to proceed to resolution by this Court on the merits of those claims.

Conclusion

For the foregoing reasons, Governmental Plaintiffs, the City of Hurricane, West Virginia, and the County Commission of Putnam County, West Virginia, respectfully submit that this Court should not and cannot give any deference to Mr. Armstead's letter or, in the context of the current Rule 12(b)(1) and (6) proceedings, to any other extrinsic documents which Defendants offer in support of their Motion to Dismiss.

JENNIFER SCRAGG KARR
PUTNAM COUNTY ATTORNEY
PUTNAM COUNTY, WV

RONALD JAMES FLORA
HURRICANE CITY ATTORNEY
HURRICANE, WV

BY: /s/ *Michael O. Callaghan*
Michael O. Callaghan
Chief Assistant Putnam County Attorney
Chief Assistant Hurricane City Attorney
NEELEY AND CALLAGHAN
159 Summers Street
Charleston, WV 25301-2134
Telephone: (304) 343-6500
Facsimile: (304) 343-6528
E-Mail: mcallaghan@neelycallaghan.com

CERTIFICATE OF SERVICE

I, Michael O. Callaghan, counsel for Plaintiffs the City of Hurricane, West Virginia, and the County Commission for Putnam County, West Virginia, hereby certify that on July 7, 2014 I electronically filed **GOVERNMENTAL PLAINTIFFS' SUPPLEMENTAL RESPONSE MEMORANDUM, FILED PURSUANT TO THIS COURT'S ORDER DATED JUNE 30, 2014** with the Clerk of this Court using the CM/ECF System which will send notification of such filing to the following:

John C. Palmer IV (WV Bar No. 2801)
Keith J. George (WV Bar No. 5102)
Robinson & McElwee PLLC
Post Office Box 1791
Charleston, West Virginia 25326
Counsel for Defendants

/s/ *Michael O. Callaghan*
Michael O. Callaghan
Chief Assistant Putnam County Attorney
Chief Assistant Hurricane City Attorney
NEELEY AND CALLAGHAN
159 Summers Street
Charleston, WV 25301-2134
Telephone: (304) 343-6500
Facsimile: (304) 343-6528
E-Mail: mcallaghan@neelycallaghan.com